MAR 21 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

No. 944

JOHN RAYMOND FINCHUM, SR.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONSE TO PETITION FOR CERTIORARI

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To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

OPINIONS IN COURTS BELOW

There are no written opinions in the courts below.

GROUNDS OF JURISDICTION

The judgment sought to be reviewed is a final judgment by the Supreme Court of Appeals of Virginia, dated and entered on the 16th day of October, 1968, which affirmed a conviction of the petitioner for a misdemeanor in the Circuit Court of Prince Edward County pursuant to trial by

jury de novo after appeal from conviction in the County Court of Prince Edward County on April 7, 1967.

The petitioner seeks reversal of the final judgment of the Virginia Supreme Court of Appeals on the grounds that the Supreme Court of Appeals should have reversed the conviction of the petitioner because the petitioner's constitutional rights guaranteed by the Eighth Amendment, the Fourth and Fifth Amendments have not been protected in the trial, to his prejudice. The petitioner further asserts that the violation of the constitutionally protected rights were claimed in the courts below and are re-asserted here and that this Court has jurisdiction under the statutory provisions of 28 U.S.C., Section 1257, and that this Court has jurisdiction to review a final judgment of the Virginia Supreme Court of Appeals by writ of certiorari.

QUESTIONS PRESENTED

1. Can a court punish or impede a petitioner in his effort to appeal a conviction in violation of petitioner's right of due process guaranteed by the Fifth Amendment?

2. Can a court include in its sentencing order a provision for banishment in violation of the petitioner's right of protection against cruel and unusual punishment under the Eighth Amendment?

3. Can a petitioner be convicted on a warrant that does not properly name him in violation of his right to protection against an improper seizure under the Fourth Amendment?

CONSTITUTIONAL PROVISIONS

Petitioner relies upon the Fourth, Fifth and Eighth Amendments to the United States Constitution which are set forth below in their entirety:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U. S. Const. Amend. IV

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U. S. Const. Amend. V

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U. S. Const. Amend. VIII"

STATEMENT OF THE CASE

(A) Material Proceedings in the Lower Courts

On April 7, 1967, petitioner was convicted of unlawfully resisting arrest on March 11, 1967, by the County Court of Prince Edward County and was sentenced to serve twelve months in jail and fined $100.00. Ten months was suspended on good behavior of the petitioner for three years. An appeal was noted by the petitioner to the Circuit Court of Prince Edward County.

On January 17, 1968, a jury trial was held in the Circuit Court of Prince Edward County on an amended warrant charging the petitioner with obstructing justice with threats and force. The petitioner was found guilty as

charged and the jury fixed his sentence at six months' suspended sentence and a fine. The jury was then instructed by the Court to return and reconsider its verdict as only the Court could suspend the sentence. The jury reconsidered its verdict and returned, eliminating the suspension of the jail sentence (T. 89).

Defense counsel moved to set aside the verdict and the Court set a date for argument on the motion (T. 95). Counsel for the petitioner, William C. Carter, filed a written motion to set aside the verdict, one of the grounds being that the original warrant to be served was improper since the defendant was not properly named (R. 16).

On February 29, 1968, the Court reconvened to hear motion to set aside the verdict, but instead the petitioner's counsel withdrew the motion (T. 94), the Court requested a recommendation from the Commonwealth's Attorney and the Commonwealth's Attorney recommended that four months of the six months' sentence imposed by the jury be suspended for a period of five years, upon the good behavior of the petitioner and upon the further condition that the petitioner remove himself to the State of Florida for a period of five years, he being a non-resident of the State of Virginia (T. 95-96). On this date the petitioner requested that he be given sufficient time to put his affairs in order before going to jail and the execution of the sentence was postponed until March 11, 1968.

On March 11, 1968, petitioner again appeared in Court and stated to the Court that he might wish to note an appeal to the Supreme Court of Virginia. Mr. William C. Carter, his attorney, stated to the Court that he had not advocated the appeal and made a motion to be allowed to withdraw as counsel from the case (T. 106). On that date the motion of Mr. Carter to be allowed to withdraw was granted and the case was continued to March 18, 1968, to allow the peti-

tioner to secure other counsel and to determine whether or not an appeal would be granted.

The case was again continued until March 22, 1968, at which time present counsel for the petitioner appeared, moved to remove the part of the suspended sentence requiring the petitioner to leave the state for five years and moved to set aside the verdict because of the improper naming of the petitioner on the warrant. The Court removed that portion of the sentence requiring the petitioner to remain outside of the state for five years and imposed the sentence as set by the jury, to-wit: sentence the petitioner to serve six months in jail (T. 148). The Court overruled the motion as to the validity of the warrant and held that it was proper (T. 162-163). The Court then committed the petitioner tc jail and continued the case until March 25, 1968, for the fixing of bond.

On March 25, 1968, again appeared the petitioner and attorney for the petitioner and moved the Court to set a bond. The Court set the bond at $2500.00 and petitioner was released from jail (T. 180).

In compliance with Rule 5:1, Section 3(e) of the Rules of the Supreme Court of Appeals of Virginia, transcripts of the record were signed and certified by counsel, signed by the Court and filed in the Clerk's Office of the Circuit Court of Prince Edward County, Virginia, on April 22, 1968.

In compliance with Rule 5:1, Section 4, notice of appeal and assignments of error were filed in the Clerk's Office of Prince Edward County on April 27, 1968, and additional assignments of error were filed on June 7, 1968. Amongst the assignments of error are the references to the illegal arrest under the improper warrant and the banishment provision of the suspension of the sentence. The petitioner filed a

petition for a writ of error to the Virginia Supreme Court of Appeals according to the rules and on October 16, 1968, the petition for writ of error was refused and the sentence of the Lower Court was confirmed. (See Appendix A) No steps were taken by the petitioner or his attorney to secure a stay of execution by the Supreme Court of Appeals of Virginia and on December 2, 1968, an order was entered by the Circuit Court of Prince Edward County committing the petitioner to jail and he was committed to jail. On December 6, 1968, the Virginia Supreme Court of Appeals entered an order staying the execution, but providing "the above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond, if out on bail." (See Appendix B) After some investigation by counsel for the petitioner, the Court and Commonwealth's Attorney, on December 16, 1968, the Court authorized the release of the petitioner on bail.

(B) Statement of Material Facts

Facts material to this petition as to the validity of the warrant presented as in petitioner's brief, and as stated the other two questions have been set forth in the statement of material proceedings in the lower courts.

The facts relevant to the validity of the warrant are as follows:

Sometime around Four O'Clock in the afternon of March 11, 1967, a Mrs. Mary Finchum came to the police station in the Town of Farmville, after talking to Officer George Crowder and identifying herself as Mrs. Mary Finchum, swore out a warrant against her husband, John Finchum, giving the address as 208 South Virginia Street, Farmville, Virginia (T. 20). Officer Crowder, who was not on duty, contacted Officers Kelsey and Rickman of the Farmville

Police Department and asked them to make the arrest based upon the warrant (T. 24-25). Officer Crowder did not recognize Mrs. Finchum when she first came in to swear out the warrant, but did recognize her upon being advised by her of her name (T. 26). Officer Crowder advised Officers Kelsey and Rickman that a warrant had been sworn out by Mrs. Finchum for her husband, John Finchum, to be served at the address shown on the warrant, being 208 South Virginia Street, Farmville, Virginia. Officer Kelsey stated that he came to the police station and saw Officer Crowder, who gave him the warrant against Finchum (T. 29); that he saw Mrs. Mary Finchum there; that he had known Mrs. Mary Finchum and Mr. John Finchum for a period of approximately fifteen years, being members of his church (T. 30). He knew their names also by keeping the records of the church as Clerk of the Session (T. 30). He also inquired of Officer Crowder as to the name of the person on whom the warrant was issued and was advised that it was John Raymond Finchum (T. 31). Officers Kelsey and Rickman went to serve the warrant at 208 South Virginia Street, saw John Raymond Finchum in the house (T. 33). A young boy, fourteen years of age, who was later identified as John Raymond Finchum, Jr., opened the door for them (T. 33). Officer Kelsey entered the house with Officer Rickman and read the warrant to the petitioner and the petitioner replied, "That's not me, that could be my boy there" (T. 33). John Finchum had had some domestic difficulty with his wife prior to the serving of the warrant charging him with making an assault on his wife (T. 70). His son was not present in the home at the time that this domestic difficulty and assault occurred (T. 70). His wife's name is Mary Loretta Finchum, the only John Finchum residing at 208 South Virginia Street were John Finchum, Sr. and John Finchum, Jr., a fourteen year old boy (T. 71).

The petitioner, John Finchum, knew that Officers Kelsey and Rickman were police officers of the Town of Farmville and also stated that they (Officers Kelsey and Rickman) knew who he was (T. 75). Officers Kelsey and Rickman talked to the petitioner for a little while, then after asking him to go with them, he refusing, they picked him up and started carrying him out of the door (T. 34). At the door the petitioner's son told the police officers, "Don't hurt my daddy." The petitioner then told his son, "Get the gun, get the gun." The son went into a back room and returned with a carbine rifle (T. 35-36). The gun had a clip in it and it is unknown whether it was loaded or not. The officers released John Finchum, who went back into another room and sat down. The officers then told Mr. Finchum they would have to arrest him and he would have to go with them. Mr. Finchum advised, "If you go and get the warrant with my name on it I will go with you" (T. 38). In order not to cause serious difficulty and injure the petitioner and his son, the officers returned to the police station, secured a warrant with the name of John Raymond Finchum, Sr. thereon (T. 39), returned and after some difficulty completed the arrest.

SUMMARY OF ARGUMENT

The Commonwealth of Virginia will show that the question of banishment raised by the petitioner is moot and further that even should the portion of the suspension order as to banishment be void, it would not effect the validity of the sentence imposed by the Court which was based upon the jury verdict. As to the restriction of the petitioner's right to appeal as contended in the brief, the Commonwealth would state that in fact the petitioner's rights were not prejudiced, that he was not prevented from perfecting his appeal, and

was in fact assisted in this appeal. The Commonwealth would further present that the warrant originally issued was a proper warrant and the arrest of the petitioner was proper.

1. Banishment

No sentence of or condition of suspension as to banishment attached to the petitioner's sentence exist and can not be heard before this Court. The order of the Court sentencing the petitioner and suspending a portion of the sentence conditioned on the fact the petitioner leave the Commonwealth of Virginia for a period of five years subsequent to his release from jail as set forth in the sentence of the Court of February 29, 1968, was charged by the Court on March 22, 1968. The Court on that date removed the portion of the order requiring banishment and imposed the sentence as set by the jury of six months in jail, without any portion thereof being suspended (T. 38).

It is further presented that even though the question is not moot and can be heard by the Court, the fact that the probation order is void as to banishment does not render the conviction and judgment void. The petitioner is still required to serve the sentence as imposed by the Court. *Vicker* v. *Lady*, ... Ky. ....., 264 S.W. 2nd 683.

2. Impeding Appeal

There is no basis for the allegation that the Court attempted in any way to impede or prevent the petitioner from perfecting his appeal to the Supreme Court. To the contrary, the Court did all it could to assist the petitioner in this regard. Trial before jury was held January 17, 1968, and the Court on motion of counsel continued the case without imposition of sentence until February 29, 1968. On

February 29, 1968, the motion to set aside the verdict was withdrawn and the petitioner was sentenced, but imposition of sentence was postponed to give the petitioner time to get his affairs in order. The petitioner was directed to appear on March 11, 1968, to submit himself to the sheriff for incarceration. On March 11, 1968, the petitioner indicated he might wish to appeal. His attorney stated to the Court that he had explained everything to Mr. Finchum and had recommended against an appeal. Mr. Carter then asked to be allowed to withdraw. The petitioner was then directed to secure counsel on the question of appeal and advise the Court by March 18, 1968. New counsel did not appear until March 22, 1968, at which time he renewed the petitioner's motion to set aside the verdict on the question of banishment and on the question that bond was denied on the original arrest (T. 140) (this point being raised for the first time at this point). The petitioner indicated he might appeal and moved the court to release him on bond. The Court took the motion to fix bond under advisement until March 25, 1968, at which time the Court granted the motion to fix bond and set bond at $2500.00.

As to the refusal of the Court to release the petitioner from jail on December 6, 1968, again petitioner and his counsel, well knowing the judgment of the Supreme Court of Appeals under order entered October 16, 1968, took no steps to stay the Supreme Court of Appeals' order until the petitioner was directed to appear on December 6, 1968, to begin serving his sentence. The order directing the incarceration was in no way detrimental to his filing a petition for writ of certiorari. All of the record indicates that the petitioner was trifling with the Court, that he was a non-resident of Virginia and after sentence the Court was concerned he would leave the state, yet at all times the Court and the

Attorney for the Commonwealth did all in their power to protect the constitutional rights of the petitioner.

In addition to the above, it should be noted that in fact the petitioner did file his petition for writ of error to the Virginia Supreme Court of Appeals and did file his petition for writ of certiorari to this Court.

3. Improper Warrant

The only grounds alleged by the petitioner as to the invalidity of the warrant was the fact that the warrant was issued against "John Finchum," instead of "John Raymond Finchum, Sr." There is no allegation on the part of the petitioner that someone else had made an assault on his wife, Mary Finchum; that he did not reside at 208 South Virginia Street in the Town of Farmville or that he was not the person on whom the warrant was issued. His only objection was that the warrant could have been issued against his son, John Finchum, Jr. (T. 33). This Court has decided that the insertion or omission of a middle name or initial is immaterial and may be disregarded on a warrant. *Keene* v. *Meade,* 28 U.S. 1, 3 Pet 1, 78 Lawyers Addition 581. This Court has further determined that where the petitioner's name was W. J. Foust while he was indicted as W. J. Faust does not constitute a material variance. *Foust* v. *U.S.,* 16 Sup. Ct. 1112, 163 U.S. 452, 44 L. Ed. 224.

CONCLUSION

For the reasons stated above, the Commonwealth of Virginia contends that the petitioner's rights have not been violated as to procedural or substantive matters. The Commonwealth would further contend that there are no federal questions of substance decided by the Virginia Supreme Court of Appeals, which have not heretofore been determined by this Court, nor have any of these questions been decided by the Supreme Court of Appeals of Virginia in a way not in accord with the applicable decisions of this Court.

WHEREFORE, your respondent respectfully prays that the petition for writ of certiorari to final judgment of the Supreme Court of Appeals of Virginia upholding the conviction of the petitioner be refused, the final judgment of the Supreme Court of Appeals of Virginia and of the Circuit Court of Prince Edward County be sustained.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By William F. Watkins, Jr.
Counsel

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Counsel for Respondent

APPENDIX A

The following is the final order by the Supreme Court of Appeals of Virginia upholding the conviction of the petitioner in the Circuit Court of Prince Edward County, Virginia:

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 16th day of October, 1968.

The petition of John Raymond Finchum, Sr., for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Prince Edward County on the 22nd day of March, 1968, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,
Teste: Howard G. Turner, Clerk
By R. P. Tomlinson
Deputy Clerk

APPENDIX B

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 6th day of December, 1968.

John Raymond Finchum, Sr.,
Plaintiff in error,

against

Commonwealth of Virginia,
Defendant in error.

Order Staying Execution of Judgment

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment rendered herein on October 16, 1968, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case rendered on October 16, 1968, be, and the same is hereby, stayed, until the 14th day of January, 1969, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,
Teste: H. G. Turner
Clerk